IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 493

DONALD WHEELDIN and ADMIRAL DAWSON,
Petitioners,

—*v.*—

WILLIAM WHEELER.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITIONERS' OPENING BRIEF

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Opinions Below

The first opinion of the District Court for the Southern District of California, rendered on August 28, 1958, dismissing the action for lack of jurisdiction over the subject matter and on other grounds (R. 16), was not reported. The first opinion of the Court of Appeals for the Ninth Circuit, rendered on June 28, 1960 (R. 22), is reported at 280 F. 2d 293. On remand, no opinion was rendered by the District Court in support of its judgment of November 8, 1960, dismissing the complaint for failure to state a claim

upon which relief could be granted (R. 24). The opinion of the Court of Appeals for the Ninth Circuit rendered on January 30, 1962 (R. 26), is reported at 302 F. 2d 36.

Jurisdiction

The judgment of the Court of Appeals for the Ninth Circuit was entered on January 30, 1962 (R. 30). The Petition for Writ of Certiorari was filed on April 30, 1962 (R. Cover). Certiorari was granted on October 8, 1962 (R. 31). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Constitutional Provision and Statute Involved

The Fourth Amendment to the United States Constitution provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Part 2, entitled Rules of the House of Representatives, of Public Law 601, 79th Congress (1946), 60 Stat. 812, provides in part (at 828):

> "Rule XI. Powers and Duties of Committees.
>
> "(q) (1) Committee on Un-American Activities.
>
> "(A) Un-American activities.
>
> "(2) The Committee on Un-American Activities, as a whole or by subcommittee, is authorized to make

from time to time investigations of (i) the extent, character, and objects of Un-American propaganda activities in the United States, (ii) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution, and (iii) all other questions in relation thereto that would aid Congress in any necessary remedial legislation.

"The Committee on Un-American Activities shall report to the House (or to the Clerk of the House if the House is not in session) the results of any such investigation, together with such recommendations as it deems advisable.

"For the purpose of any such investigation, the Committee on Un-American Activities, or any subcommittee thereof, is authorized to sit and act at such times and places within the United States, whether or not the House is sitting, has recessed, or has adjourned, to hold such hearings, to require the attendance of such witnesses and the production of such books, papers, and documents, and to take such testimony, as it deems necessary. Subpoenas may be issued under the signature of the chairman of the committee or any subcommittee, or by any member designated by any such chairman, and may be served by any person designated by any such chairman or member."

This Rule, in precisely the same language, was incorporated in H. Res. No. 5, 85th Cong., 1st Sess. (1957), which was in force at the time the subpoenas against petitioners were issued, and in resolutions adopted at the commencement of each succeeding Congress, including the present.

Article III, Section 2 of the Constitution provides in pertinent part:

"The judicial Power shall extend to all cases, in Law and Equity, arising under this Constitution, the laws of the United States, . . ."

28 USC 1331(a), [62 Stat. 930, as amended by 72 Stat. 415] provides:

"The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States."

Questions Presented for Review

1. Whether the United States District Court has jurisdiction of an action for damages for violation of the right to freedom from unreasonable search and seizure against an investigator for a Congressional Committee who, in excess of his authority, causes a void subpoena to be issued and served.

This question was not presented in the petition for writ of certiorari, it having been decided favorably to petitioners by the court below in its first opinion (R. 23) and not challenged by respondent following that opinion nor in opposion to the petition for writ of certiorari. The question is presented and discussed here by direction of this Court in its order granting certiorari (R. 31).

2. Whether the power to issue subpoenas, conferred by Congress on the chairman of the Committee on Un-American Activities of the House of Representatives and on the chairmen of each of its subcommittees and on any Committee member designated by any such chairman, can be delegated by the chairman of the Committee to an investigator for the Committee.

3. If the power to issue subpoenas is outside the authority that can lawfully be delegated to an investigator for the Committee, whether the investigator is liable in damages for injury caused by his illegal and malicious issuance of subpoenas.

4. Whether a government employee of the rank of investigator for a legislative committee is immune from liability in damages for malicious use of his authority; whether he is liable for malicious issuance of subpoenas even if issuance is within his authority.

5. Whether an investigator for a legislative committee is immune from liability for damages when he directs the service of a subpoena in a manner he deliberately and maliciously contrives and intends to cause injury, and which in fact causes such injury.

Statement of the Case

The facts are not in dispute, the case being here after affirmance by the court below (R. 30) of a judgment of the District Court dismissing the action for failure to state a claim under which relief can be granted (R. 24).

Allegations of the Complaint

Respondent Wheeler, a resident of Southern California, has for many years been a special investigator for the Committee on Un-American Activities of the House of Representatives (hereinafter called the Committee), performing investigative services for the Committee in Southern California (R. 1-2). Wheeler obtained from the Committee a number of subpoenas which bore the signature of Francis E. Walter, chairman of the Committee, but which were not otherwise filled in (R. 4, 9). Wheeler thereupon

determined to summon petitioners Wheeldin and Dawson to appear and testify at a hearing of the Committee in Los Angeles, California; filled in the subpoenas to command their respective appearances; and directed that the subpoenas be served upon the respective petitioners (*ibid.*).

The effect of such subpoenas was, as Wheeler knew and intended, to command petitioners, on pain of fine and imprisonment for contempt, to appear and answer at a hearing devoted to questioning them on their beliefs, expressions, and associations; where information derogatory to them, from the Committee's files, would be publicly recited and disclosed; where petitioner Wheeldin's past membership in the Communist Party and petitioner Dawson's past or present membership would be exposed, and beliefs, expressions or associations of petitioners that are unpopular and hateful to the public, would be publicly revealed (R. 4-6, 9). Each petitioner would suffer injury to his reputation and in his employment and employment expectations from such appearance before the Committee, and, prior to the hearing, from newspaper publicity about his scheduled appearance; his wife and children would likewise be injured (R. 6, 9-10). In addition, with the purpose and the result of causing petitioner Dawson's discharge from employment, Wheeler directed that the subpoena be served upon him at his place of employment (R. 10). Respondent Wheeler, maliciously and without lawful reason, for the deliberate purpose of injuring petitioners, issued the subpoenas against petitioners and served petitioner Dawson's in the described manner, at his place of employment (R. 5, 6, 10).

The complaint prayed for a declaratory judgment that the subpoenas were void, an order staying or continuing their return date, and for damages against respondent and the federal and state officers who served or caused to be served the subpoenas (R. 10-11).

Proceedings

In the first proceedings before the District Court wherein that court dismissed the action, the claim for declaratory relief was dismissed as an exercise of the court's discretion to deny this form of relief (R. 20), while the claim for money damages against respondent and the other defendants was dismissed for "lack of jurisdiction over the subject matter" (R. 21).

Upon appeal, the Court of Appeals for the Ninth Circuit held that the claim for injunctive relief had become moot, and that the dismissal of the claim for declaratory judgment was within the District Court's discretion (R. 23). While the claim for money damages was held properly dismissed against the other defendants, the court held: "As to House Investigator Wheeler . . . there was jurisdiction to entertain the claim for money damages" (R. 23). Respondent filed neither a petition for rehearing in the court below nor did he file a petition for writ of certiorari here.

On remand, the District Court ruled, without opinion, that the action was dismissed for failure to state a claim upon which relief could be granted (R. 24). Petitioners appealed again.

Court of Appeals' Decision on the Merits

The Court of Appeals affirmed the District Court's judgment of dismissal (R. 30).

In its opinion, the court below recognized that "the gravamen of their (petitioners') complaint is that the subpoenas were invalidly, maliciously and mischievously issued and served for the sole purpose of exposing them to public scorn with consequent loss of employment and of esteem" (R. 26-27). However, it concluded that "the conduct complained of falls within the scope of appellee's authority as a com-

mittee investigator . . . As to injuries resulting from such conduct appellee is, under the rule of *Barr* v. *Matteo*, immune from liability" (R. 29).

The court supported this conclusion on the basis of the practical need for delegation of the subpoena power (R. 27). It quoted a concurring opinion in this Court that the individual authorized by law to issue subpoenas may, because of his workload, face the practical alternatives of either signing subpoenas in blank, or signing batches of subpoenas already filled out by subordinates without examining the reason for their issuance (R. 27). The court indicated (R. 27-28) the latter method of issuance would be valid: that it would be lawful and proper for the Committee to accept its investigator's conclusion as to the need for issuing a subpoena against a particular individual. To impose liability because the official authorized by statute to subpoena—here the chairman of the Committee—signed subpoenas in blank instead of signing them on the basis of the investigator's conclusion, would emphasize a merely formal distinction in method of issuance and would "run counter to the principle of immunity recognized in *Barr* v. *Matteo*, . . ." (R. 28).

ARGUMENT

Summary of Argument

There is federal jurisdiction in the case because the case arises under the Constitution and a law of the United States. If petitioners are right that the Committee's enabling resolution granted no power to delegate the subpoena issuing authority to one who is not a member of the committee, then respondent acted in excess of his authority and is liable in damages. This becomes the more clear because in so issuing and effectuating service of compulsory process, petitioners' rights to freedom from unreasonable search and seizure were abridged. This is precisely the kind of a wrong over which the federal courts have jurisdiction.

On its face the Committee's enabling resolution does not purport to authorize the Committee to delegate its subpoena issuing power to one who is not a member. On the contrary, on its face, it purports to do just the opposite and to restrict that right to the Committee or a subcommittee chairman or a member of the Committee delegated by such a chairman. Particularly because of the nature of the Committee involved, the nature of its investigations and the harmful effect which ensues to a citizen who is subpoenaed before the Committee, it should be held that there was no power to delegate.

If, as petitioners claim, respondent acted in excess of his authority because he had no power to determine who should be subpoenaed as a witness before the Committee, respondent is not immune from suit. The immunity doctrine has never been extended to immunize a federal employee from suit for damages visited when he acts beyond

his authority. And, in any event, the immunity doctrine does not extend to ministerial, non-policy making employees. The action for damages is the traditional remedy in that instance.

I.

The District Court Had Jurisdiction.

The Court of Appeals upheld the District Court's jurisdiction over the claim for damages against respondent, on the basis of *Bell* v. *Hood,* 327 US 678 (R. 23). It also cited three of its prior opinions which had in turn relied on *Bell* v. *Hood's* statement that:

> "The right of petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another. For this reason the District Court has jurisdiction" (327 US at p. 685).

The principle, in the often-quoted words of Mr. Chief Justice Marshall in *Cohens* v. *Virginia,* 6 Wheat. (US) 264, 379, is that a case " 'may truly be said to arise under the Constitution or a law of the United States whenever its correct decision depends on the construction of either' ". *Smith* v. *Kansas City Title Co.,* 255 US 180, 199.

In the case at bar petitioners assert (R. 3, 9) that their right to freedom from unreasonable search and seizure as guaranteed by the Fourth Amendment to the United States Constitution was abridged by the service upon them of compulsory process issued pursuant to Congressional resolution purporting to authorize the Committee so to do. They likewise assert (R. 2, 8) that in causing the issuance of the subpoenas and effectuating their service upon them, respondent acted in excess of his authority. Accordingly,

just as in *Bell* v. *Hood*, the correct decision of the case depends upon the construction to be given by the federal courts to the Fourth Amendment and to the statute, here the Resolution, under which respondent purported to act.

The complaint, to put the case somewhat differently, discloses federal jurisdiction because its allegations come within the test of federal jurisdiction as outlined by Mr. Justice Cardozo in *Gully* v. *First National Bank*, 299 US 109, 112: "How and when a case arises 'under the Constitution or laws of the United States' has been much considered in the books. Some tests are well established. To bring a case within the statute, a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiffs' cause of action . . . The right or immunity must be such that it will be supported if the Constitution or laws of the United States are given one construction *or* effect, 'and defeated if they receive another' . . ." (emphasis added)

If the scope of the Fourth Amendment and the Committee's enabling resolution are given a construction or effect by the federal courts favorable to petitioners, their rights will be supported and they will be entitled to prevail; if, on the other hand, the federal courts give the Amendment and the Resolution a different construction or effect, adverse to petitioners and favorable to respondent, petitioners' claims will be defeated.

Hence the complaint raises a substantial controversy as to the scope, meaning or effect of a provision of the Constitution and requires the federal courts to pass upon, construe and interpret a particular Congressional Law.

When the construction by the federal courts of a federal statute and, particularly, the Constitution itself (here petitioners claim that their rights to the freedom from "unrea-

sonable" search and seizure under the Fourth Amendment have been abridged) is required, it would seem manifest that the cause "arises" under the Constitution or laws of the United States within the purview of 28 USC 1331. This would seem to be the meaning of this Court's decision in *Tunstall* v. *Brotherhood of Locomotive Firemen and Engineers*, 323 US 210. Indeed, here the case is stronger for federal jurisdiction, for there the suit was against *private parties;* here it is against a *federal officer* purporting to act as such, albeit, as petitioners say, in excess of his authority.

A long line of cases[1] establishes that the federal courts do have jurisdiction in suits for damages against federal officers who have acted in excess of their authority. This Court's decision last year in *Malone* v. *Bowdoin*, 369 US 643, though concerned with the question as to whether specific relief against an officer was in reality a suit against the United States, did not question the *jurisdiction* of the federal courts to entertain the suit.

Moreover, cases like *Bock* v. *Perkins*, 139 US 628, *Howard* v. *United States*, 184 US 676 and *U. S. ex rel. Rogers* v. *Conkins*, 1 Wall. (68 US) 714, which sustained federal court actions for damages against federal officers for conduct with regard to service of process or liability under a bond, are directly in point here and sustain federal jurisdiction in the case at bar.

The Court below was eminently correct in that portion of its ruling which sustained federal jurisdiction. It was right in its ruling that *Bell* v. *Hood* applies.

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[1] E.g., *Little* v. *Barreme*, 2 Cranch 170; *Tracy* v. *Swartout*, 10 Pet. 80; *The Charming Betsy*, 2 Cranch 64; *Wise* v. *Withers*, 3 Cranch 331; *Gelston* v. *Hoyt*, 3 Wheat. 246; *Teale* v. *Fenton*, 53 US 284; *Belknap* v. *Schild*, 161 US 10; *Bell* v. *Hood*, 327 US 678.

II.

Congress Did Not Authorize the Committee's Investigator to Issue Subpoenas Nor the Committee the Right to Delegate That Power to Him: Hence the Subpoenas Were Void.

As this Court has recognized, a delegation of the subpoena power presents an important issue as to the use of governmental coercion. See *Cudahy Packing Co.* v. *Holland*, 315 US 357; *Fleming* v. *Mohawk Co.*, 331 US 111. And the subpoena power here in issue has far graver consequences than the interference with privacy effected by the subpoenas involved in those cases or in the usual situation. A subpoena from this Committee is more than mere "officious intermeddling." (See *Oklahoma Press Publishing Co.* v. *Walling*, 327 US 186, 213.)

The witness subpoenaed to testify by this Committee must, on pain of fine and imprisonment for contempt, answer questions about any past or present beliefs, expressions, and associations bearing on subversion, for that is this Committee's authorized area of inquiry. See *Wilkinson* v. *United States*, 365 US 399; *Barenblatt* v. *United States*, 360 US 109. Since the "forced revelations concern matters that are unorthodox, unpopular, or even hateful to the general public, the reaction in the life of the witness may be disastrous." *Watkins* v. *United States*, 354 US 178, 197. Indeed, the mere knowledge that an individual has been subpoenaed by this Committee creates suspicion and public hostility to him.

The individual exercising this Committee's subpoena power not only wields a power with fearsome consequences; moreover, he has wide discretion as to who will suffer these consequences. The subpoenas here in issue (R. 12, 13) did not specify any subject of investigation, and this Court may

judicially notice from its past cases concerning Congressional investigating committees that this is the usual form. Thus the individual with the power to fill in the name of the witness has authority to summon anyone who might have information relevant to any aspect of the very broad area of investigation under this Committee's jurisdiction. By the same token, the issuer of the subpoenas may choose not to develop a particular subject or to summon a particular potential witness. That is, not all persons who might have information within the Committee's wide compass are subpoenaed and forced to choose between contempt and answering the Committee's questions. Indeed, in this very case, petitioner Dawson, though apparently thought to have relevant information, was not forced to testify because the hearing was adjourned for fortuitous reasons before the time scheduled for his appearance. (Opposition to Petition for Writ of Certiorari, pg. 2, fn. 1.) The lightning does not strike uniformly; the issuer of the subpoenas decides where and when it will hit.

Because of the high potency of the instant subpoena power, its delegation poses an especially important issue.

Further, this delegation, by a legislative committee rather than an administrative agency as in the prior cases in this Court, presents the issue of Congressional responsibility with which this Court has been greatly concerned.

An investigating committee's power to subpoena witnesses is justified by the need of Congress for information. Here Congress confers the power on the chairmen of a committee and its subcommittees and authorizes them to confer it on committee members. Certainly, re-delegation of this power to a non-member marks a serious divorce from the Congress of its responsibility to determine its needs for information, and to determine whether to require information from a particular witness at the cost of the

infringements consequent on use of the subpoena power. Thus, this case presents a novel and important question as to "separation of power from responsibility." See *Watkins*, 354 US at p. 215; *Sweezy* v. *New Hampshire*, 354 US 234, 255.

The Court below (R. 27-28) grounded its decision on the reasoning of Mr. Justice Jackson in *Fleming* v. *Mohawk Wrecking and Lumber Co.*, 331 US 111, 123, that the individual authorized by statute to issue subpoenas often has such a workload that he must either sign a large batch of subpoenas in blank, to be filled in by his subordinate, or must sign a batch already filled out by the subordinate "'without examining the causes for their issuance.'" The Court below then assumes that the latter practice would be permissible (R. 27): "The congressional committee in the case before us investigates through its investigators and one may assume that it would accept their conclusions as to the relevance of any witness' testimony." On the premise of the validity of this practice, and explaining that the difference between such pro forma issuance by the chairman and the practice followed here of the chairman signing in blank is "somewhat formal", the Court reasons that (R. 28) "the principle of immunity (which we discuss below) recognized in *Barr* v. *Matteo* . . . should not be frustrated by a turn of formalities. . . ." The Court's conclusion that petitioners' injuries resulted from conduct related to matters within respondent's authority and that he was therefore immune from liability under the *Barr* rule, rests on these crucial considerations: it was not incumbent upon the chairman to exercise his own discretion in the issuance of subpoenas; the subpoenas could and would necessarily have been issued by the chairman if respondent so recommended; respondent's direction, on his own, of subpoenas to petitioners, therefore was not a significant departure from his authority.

The fundamental error of the Court below—basic to its second conclusion that respondent is immune from liability—is its view that there is no obligation on the chairman to exercise his own discretion with respect to the issuance of subpoenas and that he can delegate this matter of judgment to an investigator. We believe the chairman can *neither* sign blank subpoenas as here, nor sign them pro forma after they are filled in, as the Court below hypothesizes. He cannot delegate to anyone but a member of the Committee the power to decide whom to subpoena, whatever the mechanics of issuance.

This Court's decision in *Fleming* is not at all apposite. The question there was whether the general rule-making power conferred by statute on the head of the Emergency Price Control Administration included authority to delegate his subpoena power to the directors of his regional offices. Emergency price control, the Court pointed out, "inaugurated probably the most comprehensive legal controls over the economy ever attempted" (331 US at p. 122). In this vast administrative operation, organized on a regional basis, the number of investigations varied from over 600,000 in 1943 to 106,240 in the first nine months of 1946. From this situation arises this Court's view that "administrative flexibility" required delegation by the Price Control Administrator of the subpoena power to his regional directors, and also Mr. Justice Jackson's view, quoted in the opinion of the Court below, as to the exigencies of the Administrator's workload.[2]

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[2] The Court below also quotes (R. 27) the dissenting opinion of Mr. Justice Douglas in *Cudahy Packing Company, Ltd.* v. *Holland*, 315 US 357, 368, that it would be impossible for the Administrator of the Wage-Hour Administration to exercise judgment as to each subpoena issued by that agency. There again, the Administrator, as Mr. Justice Douglas pointed out, directed a large administrative organization which included 13 regional offices and directors,

In the only other situation where this Court has countenanced delegation of the subpoena power, there not only was a vast administrative operation, but there was no discretion as to the issuance of subpoenas. *Lewis* v. *National Labor Relations Board,* 357 US 10. There the statute directed that a subpoena issue on the application of any party. Delegation of the subpoena power by the head of the agency to his regional directors was held permissible since the issuance of subpoenas was ministerial and there was "no delegation of any act entailing the exercise of discretion . . . " (357 US at p. 15).

The situation of the Committee at bar is wholly dissimilar from that of the agencies involved in *Fleming* and *Lewis.* A liberal maximum estimate of the number of subpoenas issued annually, judging from the Committee's annual reports for 1958—the year the subpoenas were issued against petitioners—and for 1960 and 1961, the most recent reports available, is 200. And issuance of a subpoena is in no way ministerial, as in *Lewis;* rather, a complicated value judgment and weighty discretion is involved in determining who should be subpoenaed to testify before the Committee. Finally, here it is not true, as in *Fleming,* that the statute only explicitly authorizes one individual, the head of the agency, to issue subpoenas.

The statute at bar explicitly authorizes issuance of subpoenas not only by the chairman of the Committee, but by the chairman of any subcommittee and by any member designated by any such chairman. It is manifest from this specification that Congress considered the precise problem

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and issued 6,000 subpoenas in one year. Further, the Administrator could delegate the power to hold hearings (315 US at p. 368). Even there, however, the majority refused to infer that Congress intended to confer unrestricted authority to delegate the subpoena power, when it was in terms granted only to the head of the agency.

of who, other than the chairman should exercise the subpoena power; the intent is clear that the power is not to be otherwise and "indiscriminately" (see *Cudahy*, 315 US at p. 363) delegated.

The other provisions of the statute and resolution at bar, confirm the intent that the Committee's powers are to be exercised only by its members. Thus, only the Committee or a subcommittee "is authorized to sit and act. . . . To hold . . . hearings, to require the attendance of . . . witnesses" or the production of documents, and to take testimony.

The status and functions of Congressional investigating committees also dictate the conclusion that the issuance of subpoenas cannot be delegated to a Committee investigator. An investigating committee is exercising for Congress its own investigative function; it does not, like an administrative agency, function independently of Congress in a field where Congress merely exercises regulatory power. "The theory of a committee inquiry is that the committee members are serving as the representatives of the parent assembly in collecting information for a legislative purpose." The committee carries out "the responsibility of the Congress . . . to insure that compulsory process is used only in furtherance of a legislative purpose" and only when the need for information outweighs the individual's interest in privacy. (*Watkins*, 354 US at pp. 200, 201.) The Committee's subpoena is issued on behalf of the full legislative body, and is to be treated as if issued by it. *McGrain* v. *Daugherty*, 273 US 135, 158.

It could not be intended, we submit, that the high and discretionary function of issuing subpoenas on behalf of Congress should be exercised by anyone the chairman of the Committee chooses to name. And it could not be intended that the House authorizing the investigation should be insulated from the use of compulsory process in its

behalf through decision-making by a mere investigator for the Committee. Compare *Watkins*, 354 US at p. 205.[3]

This Court has said that the subpoena power is "a power capable of oppressive use, especially when it may be indiscriminately delegated and the subpoena is not returnable before a judicial officer. . . ." (*Cudahy*, 315 US at p. 363). Here as we have already pointed out, the issuance of a subpoena has much more drastic consequences than in *Cudahy* or the ordinary situation. This factor underscores the error of the conclusion of the Court below that the chairman of the Committee could delegate to a Committee investigator the power to decide whom to subpoena.

III.

Respondent Is Not Immune From Suit.

A. *Barr* v. *Matteo* Is Not Applicable, and Should Not Be Extended, to All Public Employees.

In *Barr* v. *Matteo*, 360 US 564; and *Howard* v. *Lyons*, 360 US 593, this Court accorded immunity from liability to certain government officials, for malicious injury inflicted in the course of their duties. But the plurality opinion in *Barr* as well as the opinions of the other justices recognized that these rulings on immunity involved a balance of "two considerations of high importance," and that the interest in "the protection of the individual citizen" from damage was sacrificed only because it was there outweighed by the

[3] Whenever the question has been presented, this Court has emphasized the personal responsibility of members of a congressional investigating committee. See *Christoffel* v. *United States*, 338 US 84, 87-88.

Even the mere power to serve process on behalf of Congress and a Congressional committee can only be exercised by individuals to whom the power is granted in accordance with explicit Congressional direction. See *McGrain* v. *Daugherty*, 273 US 135, 155-156.

public interest in shielding the officials from the hazards of liability.

The Court below assumed that the immunity of government employees from liability applied without limitation, and that it was unnecessary to repeat the balancing process used in *Barr* and *Howard*, despite the gross difference in circumstances there and here. There the government officers held the respective posts of Acting Director of a government agency and Commander of the Boston Naval Shipyard—high policy-making positions. Respondent, in contrast, is employed in the legislative department, with the rank of investigator for a Congressional committee; his position and, as we shall show, his validly authorized duties, were of a ministerial nature. Furthermore, the injurious acts—the issuance and service of subpoenas—are a type for which actions for damages traditionally lie (*infra*, p. 23).

The precedents on which *Barr* relies and some of the language of the *Barr* opinions, indicate that the rule of immunity knows some limit in terms of the position and duties of the employee. The Court of Appeals for the Second Circuit recently expressed doubt that the *Barr* rule of immunity applied to the "lower echelons" of employees. *Poss* v. *Lieberman*, 299 F. 2d 358, 360 (1962), cert. den. 370 US ——, 8 L. ed. 2d 810. And Judge Waterman, concurring in another Second Circuit opinion said: "A rational doctrine originally evolved to protect high-ranking policy-making administrative officers of our government should not be extended to cloak with immunity all government employees." *Gustavsson Contracting Co.* v. *Floete*, 299 F. 2d 655, 660 (1962).

As explained in one of the cases cited in *Barr*, the courts are "reluctant to recognize and extend the exception" to liability.[4]

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[4] *Cobper* v. *O'Connor*, 99 F. 2d 135, 140 (CA DC 1938). And see *Glass* v. *Ickes*, 117 F. 2d 273, 282 (CA DC 1940): while

Even if the issuance of subpoenas were related to matters within respondent's authority in the sense intended by *Barr* (which we discuss below), we urge that the *Barr* rule of immunity is inapplicable to respondent because he was not in a policy-making position.

A review of the cases on which *Barr* relies shows that immunity has been extended in two types of situations: where the official was in a high-level or policy-making position, or where, though he was in a somewhat lower position, the case involved the special issue of privilege for reports within an agency.[5] *Kendall* v. *Stokes*, 3 How. (44 US) 87 at p. 98, emphasized that immunity from liability does not apply to an officer performing merely "ministerial" functions; this formulation of the principle has been repeated throughout the cases and has been generally accepted by commentators as well.[6]

Judge Croner concurred in holding the Secretary of the Interior immune from liability for acts within the scope of his duties, he expressed opposition to any extension of immunity with the statement "No man in this country is so high that he is above the law."

[5] *Cooper* v. *O'Connor*, 99 F. 2d 135, cited in *Barr* at note 7, in which immunity was extended to an F.B.I. agent, is an exception to the principle stated in the text. It seems to be the only instance of immunity for an employee on that level. However, the fact that the agent was there coupled as a defendant with high-ranking officials may have been a factor in the decisions.

Taylor v. *Glotfelty*, 201 F. 2d 51, is the other exceptional case cited in *Barr* (at note 9). There the suit was against a psychiatrist at the Medical Center for Federal Prisoners for a mistaken diagnosis; the Court held the psychiatrist was "not liable . . . because of a mistake of fact made by him in the exercise of his judgment or discretion" (201 F. 2d at p. 51).

[6] See Davis, *Administrative Law* (1958) Vol. III. Secs. 26.02–26.04; Prosser, *Torts*, 2d ed. 1955, sec. 95, p. 612; *Recent Cases* (commenting on *Barr* v. *Matteo*), 44 (1960) Minnesota Law Rev. 547, 550.

Under the Federal Tort Claims Act as well, a distinction is drawn between administrative duties and "decisions . . . responsibly made at a planning rather than operational level. . . ." (*Dalehite* v. *United States*, 346 US 15, 42.)

We submit that the *Barr* ruling should not be construed as erasing the well-established limitation on immunity from liability. The discussion in the *Barr* plurality opinion of the reasons for immunity indicates, we believe, that it should be accorded only to officials exercising policy-making functions. Significantly, the opinion takes as a starting point *Bradley* v. *Fisher*, 13 Wall. (80 US) 335, where immunity for a judge of a court of superior or general jurisdiction rested largely on the ground that he must be "free to act upon his own convictions" (13 Wall. at p. 347).[7] The public interest in fearless expression, emphasized in this and other cases, obviously is most telling in the case of policy-making officials.

Unless there are compelling policy considerations, like those the Court found in *Barr* and *Howard*, no exception should be made to the customary rule of "liability that makes a man responsible for the natural consequences of his acts." (See *Monroe* v. *Pape*, 365 US 167, 187.) Respondent was not in a position or exercising duties which call for an extension to him of immunity from liability for wrongful and malicious acts.

Moreover, both *Barr* and *Howard* were concerned with the scope of privilege as a defense in a defamation case. This itself raises free speech considerations not present here. The reach of those decisions should not be extended beyond their holdings.

B. Immunity Does Not Apply When the Employee Acts Outside His Lawful Powers.

Since the authority to determine whom to subpoena was not delegable to respondent investigator, this determination

[7] Commentators on the immunity ruling in *Barr* viewed it as justified by the "important social interest in complete freedom of communication and unfettered judgment." Handler and Klein, *Executive Privilege*, 74 (1960) Harvard Law Rev. 44, 56.

was outside the scope of his duties and he is not immune to liability for injuries resulting from his acts.

It is established in *Barr* v. *Matteo*, and a premise in all the cases on which *Barr* relies, that a government employee has immunity from liability for wrongdoing only when the acts complained of are committed in the performance of his duties. 360 US at pp. 573, 575. Indeed, the court below accepted this principle. Its erroneous conclusion was based on its view that the issuance of subpoenas was within the authority that could be delegated to respondent, or at least was closely related to the investigator's authorized duties. Starting with the investigator's power to "present them (the petitioners) to the committee as proposed witnesses," the court below concludes that the "injurious action (issuance of subpoenas) . . . resulted from the manner in which he has done the very thing he was employed to do" (R. 28).

We urge that final discretion and judgment as to whom to subpoena is a different type and level of authority from that possessed by respondent investigator. Exercise of this discretion cannot be considered related to matters committed to respondent's authority, in the sense of the relation intended by *Barr*.

The principle, albeit in different context, that immunity does not attach when the employee acts outside his lawful authority, was most recently recognized by this Court last term in its decision in *Malone* v. *Bowdoin*, 369 US 643. Quoting from its decision in *Larson* v. *Domestic and Foreign Commerce Corporation*, 337 US 682, 702, this Court reiterated (369 US at 647) that immunity does not apply "if the officer's action is 'not within the officer's statutory powers or, if within those powers, . . . their exercise in the particular case are constitutionally void.'"

In the case at bar, as we have seen, respondent had no power given him by Congress or lawfully delegated to him

by the Committee to make the decisioned judgment as to whom shall be subpoenaed by the Committee. Petitioners here do and have asserted (R. 2, 8) "that the (respondent) was exceeding his delegated powers" (*Malone,* 369 US at 648). Respondent, therefore, is not immune.

The practical objection might be made that it is unfair to impose liability on an employee when, as apparently was the case here, his superior authorized him to act. Such a practical objection is met by the practical answer that the government indemnifies the employee against any personal loss. As long ago as *Tracy* v. *Swartout,* 10 Pet. (35 US) 80, this Court held that the Collector of Customs was personally liable for an unlawful act though he was acting in good faith in accordance with instructions from the Secretary of the Treasury; the Secretary's instructions did not exempt the Collector from liability because they were "not given in accordance with law" (10 Pet. at p. 94). The Court recognized the "personal inconvenience (to) an officer who shall be held responsible in damages for illegal acts done under instruction of a superior," but pointed out that the Government was bound to indemnify him (10 Pet. at p. 98-99). The mere inconvenience is offset by the fact that immunity from liability would mean the greater hardship of denial of redress for an unlawful act and denial of a means of challenging illegal power. In the instant case it is clear that respondent will be indemnified and that he has already been and will be spared all legal expenses in this proceeding. See House Report No. 1085, 87th Cong., 1st Sess. (pp. 3, 5), as to representation of respondent by United States Attorney and payment of fees by Government to private attorneys acting as co-counsel for respondent. And see *Jones* v. *Kennedy,* 121 F. 2d 40, 45 (CA DC 1941) approving representation by Securities and Exchange Commission attorneys of Commission members, in suit brought against the members in their individual capaci-

ties. See also, *United States* v. *Josephson*, 165 F. 2d 82, 93, fn. 2, repayment by Congress of the judgment obtained against the Sergeant-at-Arms of the House of Representatives in *Kilbourn* v. *Thompson*, 103 US 168.

C. An Action for Damages for Wrongful Issuance of a Subpoena or a Wrongful Manner of Service Falls Within a Traditional Form of Remedy.

There has never been immunity from liability for injuries caused by an invalid warrant or an illegal search or an illegal seizure. Indeed, the damage suit against an officer who conducts an unlawful search or who procures a warrant maliciously and without probable cause, or against a magistrate who issues a warrant without jurisdiction, has been regarded as a desirable means of deterring such illegality. See *Wolf* v. *Colorado*, 338 US 25, 30 at note 1, 42. See *Williams* v. *Kozak*, 280 Fed. 373 (CA 4, 1922), cited in *Wolf*, where damages were allowed against a justice of peace for issuing a search warrant that was invalid because it was not based on a complaint under oath; damages were also allowed against the officer who served the warrant.[8]

Thus, in *Kilbourn* v. *Thompson*, 103 US 190, suit for damages was brought against the sergeant-at-arms of the House of Representatives by an individual he had imprisoned for resisting a subpoena; damages were allowed because the subpoena was invalid. While the House committee members responsible for the subpoena were protected from suit by their legislative immunity, this immunity did not extend to Congressional employees. See also *Anderson* v. *Dunn*, 6 Wheat. 204, another suit against the sergeant-at-arms of the House; damages were denied be-

[8] See also *Hatahley* v. *United States*, 351 US 173, 181; compare *Monroe* v. *Pape*, 365 US 167 with *Tenney* v. *Brandhove*, 341 US 367.

cause the arrest was held lawful, but there was no suggestion that he was immune from liability.

The instant action, based on unlawful and malicious issuance and service of subpoenas, involves the same kind of function as the foregoing cases. Analytically, just as a subpoena duces tecum is a "constructive" or "figurative" search and seizure *(Oklahoma Press Publ. Co.* v. *Walling*, 327 US 186, 213), the instant subpoenas to appear and testify effect "constructive" or "figurative" arrests. In the one case, there is a coercion to produce documents; in this case, there is a coercion with respect to bodily freedom.

Thus, to extend immunity to respondent would be contradictory to a line of authority establishing the right to sue for damages for the type of conduct here in issue. This line of authority and *Barr* are fully consistent, for the search, seizure and arrest cases did not involve policy-making functions.

CONCLUSION

The judgment should be reversed.

Respectfully submitted,

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